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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1250

DERMOTT NOONAN,

Petitioner,

—against—

MIDLAND CAPITAL CORPORATION,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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The petitioner, Dermott Noonan, has petitioned this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on January 4, 1972 (453 F.2d 459), affirming the granting of a motion for a directed verdict in favor of respondent by the District Court for the Southern District of New York. The respondent, Midland Capital Corporation, respectfully urges that such petition be denied.

Statement of the Case

The facts in this case, the issues tried and the basis for the direction of a verdict in favor of respondent are set forth in the opinions of the District Court and the Court of Appeals attached as appendices to the Petition herein.

Questions Presented

In his Petition, petitioner sets forth two "questions" for review by this Court and for which certiorari should issue, *viz.* (1) whether the direction of a verdict for respondent in this case violated petitioner's right of jury trial under the Seventh Amendment to the Constitution of the United States, and (2) whether the directed verdict "conflicts with applicable principles of substantive law". These contentions are discussed separately below.

Reasons for Denial of Writ

I.

As to petitioner's contention that the directed verdict violates his constitutional right of jury trial:

A. The courts below applied the correct legal standards in granting the directed verdict and properly concluded that there was no evidence from which a jury could reasonably grant a verdict to the petitioner.

The basis on which the District Court granted respondent's motion for a directed verdict is summarized in the following portion of its opinion:

> "Viewing the evidence, as we must for this purpose, in the light most favorable to plaintiff, . . . and assuming all debatable inferences his way, the court concludes that no jury of reasonable and fair minded people exercising impartial judgment could find a verdict in his favor. *There is not a scintilla of evidence* that defendant ever agreed, either as primary or secondary obligor, to be liable to pay plaintiff for his consulting services. . . ." (emphasis added)[1]

[1] Appendix to Petition (hereinafter "App.") pp. 3a-4a.

The Court of Appeals, in affirming, stated the legal test for its review as follows (App. pp. 8a-9a):

> "We apply, of course, the accepted rule that '[w]hether the motion is one to direct a verdict or to set aside a verdict which the jury has returned, the test applied by the court is the same. The evidence must be viewed in the light most favorable to the party other than the movant. The motion will be granted only if (1) there is a complete absence of probative evidence to support a verdict for the non-movant or (2) the evidence is so strongly and overwhelmingly in favor of the movant that reasonable and fair minded men in the exercise of impartial judgment could not arrive at a verdict against him.' *Armstrong* v. *Commerce Tankers Corp.*, 423 F.2d 957, 959 (2d Cir. 1970)."

Petitioner does not take issue with the legal standards expressed in the opinions below. Indeed, he could not since such standards are the same as those formulated by this Court, *see Brady* v. *Southern Railroad*, 320 U.S. 476, 479-80 (1943), and are wholly consistent with the authorities cited on pages 7 and 8 of the Petition. Rather, he attacks the application of such standards by both the District Court and the Court of Appeals and asserts that the courts below were wrong in their conclusion that the evidence was not sufficient to go to the jury.

Thus, petitioner seeks to require this Court to review the evidence in detail to determine whether the courts below were in error in concluding that petitioner failed to prove a *prima facie* case. Although from time to time this Court has granted certiorari for the purpose of reviewing the sufficiency of the evidence, it has done so primarily in actions brought under the Federal Employers' Liability Act, where the Court has found it necessary to protect the jury trial rights of the litigants against denial resulting from

"misconception" on the part of the lower courts of the "special features" of that Act which "make it significantly different from the ordinary common-law negligence action." *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, 510-11 (1957); *cf. Wilkerson* v. *McCarthy*, 336 U.S. 53 (1949) and concurring opinion of Mr. Justice Douglas, 336 U.S. at 68. As a general rule, this Court has stated, "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). Particularly this should be true when both courts below have agreed, without dissent, that the evidence presented by petitioner is insufficient. *Cf. Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949).

In any event, a reading of the opinions below makes it clear that there was, indeed, no evidence which, in petitioner's words, "would permit reasonable men to reach different conclusions." Each argument as to the evidence and the inferences to be drawn from such evidence made by petitioner herein was also made by him in the Court of Appeals. The Court of Appeals, after an exhaustive review of the record and after carefully considering such arguments, concluded that petitioner utterly failed to prove a *prima facie* case and stated:

> "Like Judge Frankel—giving full credence to plaintiff's factual testimony, to the other evidence in his behalf, and to the inferences reasonably flowing from that evidence—we conclude that, on the record and on the case as tried and presented, there could not be a reasonable difference among jurors as to the making of the contract asserted by appellant. A verdict for plaintiff 'could only be the product of surmise, speculation, and conjecture, and could not be derived from fairly weighing evidence.'" (App. pp. 11a-12a)

B. Certiorari should not issue to review questions not raised in the court below.

Petitioner did not assert either in the Court of Appeals or in the District Court that a directed verdict would deprive him of his constitutional right to jury trial. Rather, petitioner's arguments in both courts were directed to whether, on the evidence, a directed verdict for respondent was proper under Rule 50b of the Federal Rules of Civil Procedure.

This Court should not review questions not dealt with by the court below. *See, e.g. Owens* v. *Union Pacific R. Co.*, 319 U.S. 715, 724 (1943); *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 397-98 (1971).

II.

Petitioner's contention that the directed verdict "conflicts with the applicable principles of substantive law" is incorrect and raises no federal question.

Petitioner asserts that the court below erred, as a matter of "substantive law," in directing a verdict for respondent, relying on *Davis* v. *Patrick*, 141 U.S. 479 (1891) and *Emerson* v. *Slater*, 63 U.S. 28 (1859), both of which involved the applicability of the statute of frauds to the facts in issue.

The courts below found no evidence of an agreement between the petitioner and the respondent and did not reach any statute of frauds question. Accordingly, neither *Davis* nor *Emerson* are of help to the petitioner. But beyond that, neither *Davis* nor *Emerson*, which were decided prior to *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), purported to rule on New York law, and, as petitioner concedes, the question here is one of New York law. The leading New York case is *Bulkley* v. *Shaw*, 289 N.Y. 133 (1942), which involved facts substantially identical to those in this case

and requires a result against petitioner. Moreover, since the question is one of New York law, no federal question is raised.

Conclusion

For the foregoing reasons, it is respectfully requested that the Petition for certiorari be denied.

Respectfully submitted,

JOSEPH CHASE,
Attorney for Respondent.